IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.Appeal 337 of 1993

Decided on 13 . 12 . 2007

State of H P .....Appellant

Versus

Mehardeen and another ..... Respondents

Coram:

The Hon'ble Mr. Justice Surjit Singh.J.

The Hon'ble Mr. Justice Surinder Singh.J.

Whether approved for reporting ?[1] *Yes.*

For the appellant : **Mr. Som Dutt Vasudeva, Additional Advocate General with Mr. D. S.Nainta, Deputy Advocate General.**

For respondent No.1 **Mr. Rakesh Jaswal, Advocate.**

For respondent No.2 **Mr. J. R. Thakur, Advocate.**

Surinder Singh, J.

Heard and gone through the record. Respondents herein were charge sheeted, for the offence of murder of Sh. Sarwan Kumar, under section 302 read with section 34 Indian Penal Code and, at the end of the trial they were acquitted, against which the appellant-State felt aggrieved and filed the instant appeal.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ? yes.***

2. Necessary facts, as emerges from them prosecution case are, that deceased Sarwan Kumar, on **1.9.1990** at about 12 noon, had gone to the place of Shankar Dass to sharp his stone cutting implements but in the evening he did not return to his home, his father Dasandi Ram waited for him for some time, when the deceased did not return he went to sleep thinking that Sarwan Kumar had directly gone to the field to keep watch on the maiz crop.

3. In the wee hours of the next morning i.e. 2.9.1990 Smt. Nikko Devi (PW2) Bua PW2) of the deceased came to the house of her brother Dasondhi Ram with a gunny bag ***(Boru***) containing the stone cutting implements to which the deceased had taken for sharpening. According to her, when she was going to her house on the way said Boru got struck to his feet which contained the aforesaid implements. On opening it Dasondi Ram found that the implements, containing in the ***boru***, were blood stained. Thereafter Dasanodi Ram, father of the deceased went to the spot, from where the boru was alleged to have been found. He saw blood at a little distance and the dead body of the deceased faced towards the ground his Parna was nearby. The dead body of Sarwan Kumar had severe cut injury marks on the head his clothes were smeared with blood. On seeing the ghastly scene he shouted for help, many people gathered there, he called his another son Bishan Dass from Shri

Naina Devi Ji through a messenger. Police reached on the spot at about 2 p.m. on the same day and recorded his statement Ex.PA under section 154 of the Code of Criminal Procedure, upon which FIR Ex.PN was registered.

Boru (gunny bag) with stone cutting implements was taken into possession vide memo Ex.PB. Inquest report Ex.PM was prepared by the police and dead body was sent for autopsy, which was conducted by Doctor N. K. Verma (PW17). He found the following ante mortem injuries on the dead body:

1. *There was an injury anterior end 1.5 cm below ear lobule right side, posterior end at a higher level. Spindle shaped 7.5 cm long 1.5 cm in middle. Anterior end of e.5 cm skin cut sub cutaneous tissue intact. Muscle below cut depth 4 cm clear cut edges, maggots present. Blood clotted effused sub cutaneous and into muscle tissue.*
2. *Spindle shaped, clean cut edges, upper end 3cm behind upper part of pinna, lower end placed posterior as compared to upper 6 cm x 1 cm. Prone exposed, effused blood is sub-cutanous tissue.*
3. *Upper edge just in front of upper edge of II extending downwards and inwards 5 cm long edge sliced, anterior edge irregular and*

avulsing ear posterioly 4 cm widest part bone exposed Effused blood in sub cutaneous tissue.

4. *4.5 cm above highest point of pinna and 3cm behind, triangular shaped, posterior edged clean cut 6 cm long, upper part 3 cm broad skin flap. Third edge irregular 3 cm bone exposed and depressed fracture 2 cm x 2 cm with fracture lines extending from corners each 1.5-2 cm long, blood effused in temporal muscle and surrounding scalp tissue;*
5. *spindle shaped, upper end 2.5 cm below lower edge of injury No.IV, lower edge placed downwards and backwards 7.5 cm x 3 cm bone exposed not fractured;*
6. *3 cm below hair line, spindle shaped 7.5 cm x 2.5 cm clean edges major part on right side. Left side edge higher placed, neck muscle cut, effused blood in adjacent planes*
7. *spindle shaped, clean edges, just above hair line 9 cm x 3 cm, left edge at higher level, 6 cm length on left side and 3 cm right, separating occipital bone and nape of neck of 4 cm deep, effused blood in deeper tissues*

8. 4 cm below right edge of injury VI, anterior edge at higher place on right side 6cm x 2cm spindle shaped 3cm depth muscles cut, effused blood in surrounding tissue.

Skull bone was fractured at the site of injury No.4 temporal parietal right.

There was no extra dural hemorrhage. Blood was found effused over the surface of brain, brain (cortex) was lacerated at fracture site associated with effused blood at surrounding side.

In the opinion of the Doctor, death was due to syncape, resulting from hemorrhage and traumatic shock, as a result of injuries caused by sharp edged weapon. The probable time between death and post mortem was 24 to 72 hours. The post mortem report is Ex.PO. The injuries on the head and neck have been shown in the diagram Ex.PO/1, at page 3 of the aforesaid report.

Police during investigation recorded statement of the witnesses. Respondents were last seen with the deceased. Accordingly, the challan was presented in the court for their trial for the murder of the deceased.

Finding a ***prima-facie*** case against the respondents, they were charge sheeted under the

aforesaid sections, to which they pleaded not guilty and claimed trial.

The prosecution examined its witnesses and examined the respondents, under section 313 of the Code of Criminal Procedure. Their case was simply simpliciter. Respondents did not enter into defence when called upon to do so.

At the end of the trial, the learned trial court acquitted the respondents on the grounds that

i) the prosecution evidence did not inspire confidence, there was delay in recording the statement of the alleged material witnesses by the police during investigation which has given impression of fabrication;

ii) evidence regarding carrying kulhara by Mehardeen and following the deceased around 9 p.m. was false and unworthy of reliance.

iii) Statement of PW9 Tarsem Chand to this effect was found contrary to the record which was belied by the documentary evidence.

iv) Surjit Singh (PW16) was also inquired by the police and remained with them as suspicion also fell upon him. He was not arrayed as an accused but in turn he was cited as a witness, whereas the circumstances raise a strong presumption that he had also a motive and an opportunity to commit the crime.

v) Theory of last seen, as propounded by the prosecution, is insufficient to sustain conviction of the respondents. The alleged motive was improved at the time of deposition in the trial by the witnesses, which was introduced for the first time.

vi) Recovery of *Khulhara* Ex.P11 is shrouded by suspicious circumstances and lastly the bunch of hair, found in the hand of the deceased, was not sent to the Forensic Science Laboratory for chemical examination, which could

> have been helpful in order to find out the truth and the explanation of the Investigating Officer for not sending to it to the said Laboratory is devoid of any logic and against all the norms of investigation, established by law. Thus, there was no circumstance against the respondents to connect them with the alleged crime.

We have reappraised the evidence on record. Admittedly, it was a blind murder, death of Sarwan Kumar was homicidal. There is no eye witness of the alleged incident. The whole case revolves around the circumstantial evidence.

There is no direct evidence of murder in this case. It hinges upon the circumstantial evidence.

Circumstantial evidence is a combination of facts creating a net work through which there is escape for the accused, because of the facts taken as a whole do not admit any inference but of his guilt. In other words the circumstances put forth should be of a definite character and tendency, pointing out towards the guilt of the accused. In

fact the trial of a criminal case is not like a fairy tale where one is free to give flight to one's imagination and fantasy. The prime question which arises in the trial is whether the accused arraigned at the trial is guilty of the crime with which he is charged. {Please see ***State of Punjab vs Jagir Singh*** 1973 S.C.2407}

Now the question before us is whether the respondents are in any way connected with the murder of Sarwan Kumar?

The prosecution case is that the deceased had left his house on 1.9.1990 for sharpening the stone cutting implements and did not return to home and he was found dead as aforesaid. Smt.Nikko Devi came with a bag containing the said implements to the house of her brother Dasondi Ram, father of the deceased, what had happened in between his leaving the house and detection of his dead body is a mystery. The prosecution has relied upon the following circumstances against the respondents:

1. **LAST SEEN**

The prosecution has examined PW 10 Dev Raj. According to him, after closing his shop at Shree Naina Devi Ji on 1.9.1990 at about 7 p.m. he started for his village Kanfara, when he reached

near the house of Mehardeen at about 8.30 p.m. he saw Mehardeen and Gopal along with the deceased sitting on the cot talking to each other but Sarwan (deceased) was abusing Mehardeen. Mehardeen respondent told him not to visit his house again and both started hurling abuses on each other. It appeared to him that they were drunk. On the next day he (PW10) left for his shop in the early hours and learnt about the murder of Sarwan Kumar during the day time. This all happened on 1.9.1990 but he was called by the police on 7.9.1990 and then he made the above statement. He stated that he had told Dasaundi on 3.9.1990 about what he had seen on 1.9.1990. Whereas Dasaundi PW1 did not state so. He also stated that he had told the police that the respondents had told Sarwan Kumar not to come to his house but this fact was not found mentioned in his statement mark E. There is nothing on the record, to show that as to how the police came to know that Dev Raj (PW10) had last seen the deceased in the company of the respondents, as aforesaid. Further, it is not explained by Dev Raj (PW10) why he did not make the statement to the police immediately on coming to know about the murder of Sarwan Kumar. Though he has stated that he had make

the statement to the police on 7.9.1990 but according to the Investigating Officer it was made after one month i.e. 7.10.1990 Such a long delay is itself a suspicious circumstance. Therefore, his testimony is shrouded by doubt.

Another witness is Tarsem Chand (PW9), who is a shop-keeper. According to him, after closing the shop on 1.9.1990 when he was going to his village and at about 9 p.m. he reached Kanfera and met the deceased, who was going towards to his house, from the side of Mehardeen's house which means Sarwan was alive when he had left the house of Mehardeen as stated by PW Dev Raj. He further stated that after walking for about 15 feet, he saw respondents Mehardeen and Gopal but he did not talk to them, as they appeared to have been drunk. In the cross-examination he stated that he came to know about the murder of Sarwan Kumar on 8.9.1990, as he had left for Delhi to make some purchases on 2.9.1990 at 6 a.m. where he remained up to 6.2.1990 and then he went to Amritsar and on 7.2.1990 he came to Anandpur Sahib and reached back to his village on 8.2.1990 and then he came to know that Sarwan Kumar had been murdered by the respondents. He was called by the police to the police station and his

statement was recorded. He further stated that he had withdrawn Rs.18,000/- from the Saving Bank Account No. CC 69 of State Bank of India at Shree Naina Devi Ji, for purchasing certain articles from Delhi. But his testimony is totally belied by State Bank's Officials, who were examined by the respondents as DW-1 and DW-2. They have specifically stated that from the saving bank accounts No.2167 and CC-69 the said witness had not withdrawn any amount, as stated by him but according to them Rs.5,000/- were withdrawn on 4.8.1990 from Account No.CC-69 and Rs.3,000/- were withdrawn on 21.8.1990. Therefore, his version is found to be false. Further except his own testimony, which is otherwise disputed, there is nothing on record to show that he had in fact gone to Delhi or Amritsar as alleged. In these circumstances, suffers from probity.

Next witness is Surjit Singh (PW16), who was also taken into custody and interrogated in this case for the murder of Sarwan Kumar. According to him, on 1.9.1990 in the evening he had gone to the house of Kalan, a widow, with whom he had relations. Her children were present there. Respondent Gopal Chand had asked him whether he

would like liquor with him but he had no money at that time and asked Gopal Chand to bring bottle from Mahsha Ram, as he owed some money. Gopal Chand brought one bottle of liquor then both of them consumed it. At about 8.30 p.m. he heard the loud voices of Sarwan Kumar and Mehardeen. On hearing Gopal Chand went to the house of Mehardeen. Subhash younger brother of Gopal Chand came after some time and told him that he heard Mehardeen saying that Mian (Surjit Singh) had spoiled the atmosphere in the house of Kalan. Thereafter he started for his house around 10 p.m. when he was in his field, guarding the maize crop at a distance of 75 yards, he heard the voice of Sarwan Kumar saying ***"Oh Mehardeen Maine Tera Kya Bigara Hai"*** but he did not hear anything from that side and thereafter he left to his house. His statement, according to him, was recorded by the police on 2.9.1990 at 4 p.m. but in fact he was confronted with his statement which was recorded on 4.9.1990. According to him, he had heard the voice of Sarwan Kumar as aforesaid whereas this fact was not mentioned in the statement recorded under section 161 of the Code of Criminal Procedure. He visited village Kanfera next day but it is surprising why he did not come to

know about the murder till 4 p.m. and also did not tell to the police about this fact that Sarwan was in the house of Mehardeen. He has stated that he went to the police on 6.9.1990 and prior to 2.9.1990 to 5.9.1990 he was in his house. This fact stands falsified by the statement of the Investigating Officer, who has stated that he had recorded his statement on 4.9.1990. Further his testimony is falsified by Mahesh Kumar (PW4) witness to the alleged recovery of Kulhara. He has also stated that Surjit Singh was with the police on 4.9.1990. Surjit Singh PW has also concealed this fact that he was suspect in the case. Even the Investigating Officer had stated that he had tried to verify the statement of Surjit Singh, thus it was formally recorded at a later date which clearly indicates that there has been some bargain to let off Surjit Singh from this case, for the reasons best known to the Investigating Officer.

In the circumstances, when the respondents had alleged that Surjit had spoiled the atmosphere in the house of ***Kalan***, Surjit Singh could have a strong motive and opportunity to cause the murder of Sarwan Kumar as he happened to be present in the village of respondents at that time. In these

circumstances, theory of last seen is totally shrouded by suspicious circumstances and no reliance can be put on the above witnesses. In ***Inderjit Singh and another vs State of Punjab*** AIR 1991 Supreme Court 1674 it has been held that where other circumstances are not incriminating, the sole circumstance of last seen in the company of the respondents is not sufficient to convict the accused respondent.

(II) RECOVERIES

Recovery of Kulhara Ex.P-11 is sought to be proved from PW4 Mahesh Kumar. According to him, Gopal Chand had made a disclosure statement (Ex.PF), under section 27 Indian Evidence Act, pursuant to which, recovery was effected from ***Talar*** of his house and taken into possession vide recovery memo Ex. PG. In his cross-examination he has admitted that on 5.9.1990 Surjit Singh (Mian) was with the police at Talar. No other house was there. He has admitted that when the police had asked the respondent Gopal Chand in the PWD Rest House at Shree Naina Devi Ji he told that ***Kulhara*** is in the Police Station but he did not go to the place from where the alleged Kulhara was recovered.

Thus, the disclosure statement and the alleged recovery has lost its importance.

Further the bunch of hair, which was found clinched in the hand of the deceased, was also not got chemically examined to know if that matches from one of the respondents and it would have afforded a best evidence of their connection with the crime. The explanation given by Govind Ram (PW 20) Investigating Officer is that since there was no evidence of grappling, therefore, he did not deem it fit to send the bunch of hair for comparison is devoid of any merit and reasonableness.

Even statement of Smt. Nikki Devi, who is alleged to have last seen the deceased in the house of the respondent Mehardeen, does not inspire confidence for the reason that she came to know about the death of Sarwan Kumar on 2.9.1990 but she did not disclose this fact to her brother Dansondi Ram, father of the deceased. She was also confronted with her statement, recorded earlier under section 161 Cr.P.C. wherein it was no so recorded.

On the critical examination of the aforesaid witnesses and for the reasons above

mentioned we find that the learned trial court had rightly picked up, discussed and appreciated the evidence of the prosecution and came to the correct conclusion. We find no perversity in the impugned judgment of acquittal, passed by the learned trial court. The appeal is dismissed.

(Surjit Singh), J.

December 13, 2007
(D)

(Surinder Singh),J.